United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7646

ORIGINAL 75-7699

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

75-7699, 76-7011

B

GEORGE RIOS, et al.,

Plaintiffs-Appellants,

-against-

P/S

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U.A., et al.,

Defendants-Appellees.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

-against-

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U.A., et al.,

Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK WITH REGARD TO ATTORNEYS' FEES

BRIEF FOR DEFENDANT-APPELLEE JOINT STEAMFITTERS APPRENTICESHIP COMMITTEE OF THE STEAMFITTERS INDUSTRY

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, :

Plaintiff-Appellant, :

-against- :

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U.A., et al., :

Defendants-Appellees. :

- x Docket No. 75-7699

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-against- :

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U.A., et al., :

Defendants-Appellees. :

- x

BRIEF FOR DEFENDANT-APPELLEE
JOINT STEAMFITTERS APPRENTICESHIP COMMITTEE

ISSUE PRESENTED

Did the Court properly find the Joint Steamfitters Apprenticeship Committee not liable for any award of attorneys' fees?

STATEMENT OF THE CASE

A. The Instant Appeal

The instant appeal and cross-appeal are from an order of the District Court as to the award of attorneys' fees and costs, entered on October 17, 1975, in accordance with Judge Bonsal's opinion issued on June 27, 1975 (400 F.Supp. 993 et seq). Pursuant to that Opinion, the Rios plaintiffs (cross-appellants, hereinafter referred to as "Rios") were awarded $50,000 in attorneys' fees plus $3,601.49 in costs, while the Government was allowed to recover $6,014.45 in costs (400 F.Supp. at 997-8), all of which are payable by Local 638. Local 638 has appealed both the award of and size of the fee, and the allowance of certain items of costs. Rios has cross-appealed because it was not granted the full amount of attorneys' fees which it sought- $128,092.50 - and because the District Court failed to hold defendants Mechanical Contractors Association of New York, Inc. ("MCA") and the Joint Steamfitters Apprenticeship Committee ("JAC") liable for that award.

B. The Facts

The JAC, in its earlier brief on back pay ("JAC Back Pay Br.") has described in some detail its functions and responsibilities with regard to the operation of the

apprenticeship program in the steamfitting industry within the jurisdiction of defendant-appellant Enterprise Association Steamfitters Local 638 ("Local 638"). Although the JAC's earlier statement of the facts adequately discusses the factual background of this case (pp. 2-8, JAC Back Pay Br.), the JAC feels compelled, in response to certain statements contained in the Rios answering brief on attorneys' fees (dated April 2, 1976, "Rios Br."), to reemphasize certain points. Specifically:

1. The sole basis for the District Court's determination that the apprenticeship program run by the JAC did not fully meet the requirements of Title VII was the use of a competitive written aptitude examination from 1964 until 1971. As regards that written examination, the district court noted the following:

a) "the difficulty of devising a fair test or of testing it for validity," 360 F. Supp. at 992.

b) that although the JAC had not sufficiently established the "job relatedness" of the tests,

> "defendants produced testimony at trial that the tests were widely used and professionally designed; that they were administered by Stevens Institute of Technology, a reputable testing institution; and that they were reasonably related to measuring the aptitudes they were designed to measure in the following four areas: verbal meaning, numerical ability mechanical reasoning, and spatial relations." Opinion, 360 F. Supp. at 992.

c) there was some evidence of construct validity for the tests given by Stevens Institute. Opinion, 360 F.Supp. at 992.

d) the earlier examination had been selected on the advice of two leading educational institutions and was generally well established and accepted (pp. 5-6 JAC Back Pay Br.).

e) neither the new test approved by the District Court, the "S-61R", nor any other test, has ever been completely validated for steamfitters as required by the EEOC.

2. None of the remaining changes made in the apprenticeship program were in fact found to be discriminatory. Specifically:

> (a) as to age, "[n]o evidence was presented that this requirement itself had a discriminatory impact on nonwhites . . ." (360 F.Supp. at 993).
>
> (b) as to the high school or equivalency diploma, the evidence was inconclusive; "[a]ccordingly, pending a recommendation by the Administrator and the adoption of an affirmative action program, the present educational requirement will be continued." (Id.)
>
> (c) as to the physical ability requirement, it was retained in toto. (Id.)
>
> (d) as to the interview, it was relatively new, so its use was permitted to continue, subject to subsequent recommendations of the Administrator. (360 F.Supp. at 994).
>
> (e) as to the length of the apprenticeship program, the JAC decided independently to reduce it to 4 years, and, subject to subsequent recommendations of the Administrator, this was permissible. (Id.)

3. The District Court, implicitly recognizing that the JAC program was substantially in compliance with Title VII,

concluded that the JAC should not be liable for attorneys' fees.

> "The JAC is a non-profit joint labor-management committee which, now as well as during the time preceding issuance of the permanent injunction in this action on June 21, 1973, conducted the steamfitters' apprenticeship program. However, JAC was not found to have purposefully discriminated against members of the plaintiff class. JAC adopted the aptitude tests used to screen applicants to the apprenticeship program in good faith upon the recommendation of experts." 400 F.Supp at 997.

ARGUMENT

POINT I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING AN AWARD OF ATTORNEYS' FEES AGAINST THE JAC

In their brief on attorneys' fees, Rios plaintiffs attack the District Court's decision not to hold JAC liable for for attorneys' fees. Appellee respectfully submits that the Court below did not abuse its discretion in refusing to assess such liability against JAC.

The statutory basis for granting attorneys' fees clearly indicates that the courts have discretion.

> "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . ." (42 U.S.C. § 2000e-5(k); emphasis added).

Although the Supreme Court in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), implied that the standard to be applied in awarding attorneys' fees in Title VII cases is the same as that applied in Title II cases, nevertheless, it also noted that the District Courts still retain substantial discretion in fashioning appropriate remedies, stating (422 U.S. at 415-6):

> "The scheme implicitly recognizes that there may be cases calling for one remedy but not another, and - owing to the structure of the federal judiciary - these choices are, of course, left in the first instance to the district courts. However, such discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.' United States v. Burr, 25 F. Cas. 30, 35 (CC Va. 1807) (Marshall, C.J.)."

Even after deciding to award such fees, the District Court has substantial discretion both in setting the amount of such fees and in apportioning the award of such fees among the various defendants. Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1008 (9th Cir. 1972); Williams v. General Foods Corp., 492 F.2d 399, 408-9 (7th Cir. 1974); Batiste v. Furnco Construction Corporation, 503 F.2d 447, 451 (7th Cir. 1974); cert. den. 420 U.S. 928 (1975). In cases where the plaintiff is successful as to some issues and not others, he may only be awarded fees as to the former and not the latter. Taylor v. Goodyear Tire & Rubber Co., 6 E.P.D.¶ 8693 (D.C. Ala. 1973). In any case, the express statutory provisions of Title VII as to attorneys' fees do not override, but merely qualify the general provisions of Rule 54(d), F.R.C.P., under which the District Court has considerable equitable discretion in awarding fees generally. 6 Moore's Federal Practice, § 54.70[3].

It should also be remembered that the standard of review to be applied to this issue is the familiar one of "abuse of discretion". 42 U.S.C. § 2000e-5(k). See also Hoitt v. Vitek,

495 F.2d 219, 221 (1st Cir. 1974); Rogers v. International Paper Company, 510 F.2d 1340 (8th Cir. 1975); Weeks v. Southern Bell Telephone & Telegraph Co., 467 F.2d 95, 97 (5th Cir. 1972); 6 Moore's Federal Practice, ¶ 54.77.

In the instant case the District Court has enunciated various reasons for declining to award fees against the JAC, which clearly support the District Court's discretion in denying such award against JAC. Cf. Guerra v. Manchester Terminal Corporation, 498 F.2d 641, 655 (5th Cir. 1974); Johnson Goodyear Tire & Rubber Co., Synthetic Rub. Pl., 491 F.2d 1364, 1382 (5th Cir. 1974); Rogers v. International Paper Company, supra, 510 F.2d at 1357; Doe v. Osteopathic Hospital of Wichita, Inc., 333 F.Supp. 1357, 1363 (D. Kan. 1971).

As discussed above (p. 2-5), the District Court found that the JAC's apprenticeship program was only deficient in its earlier use of a test which subsequently was found not sufficiently job-related to withstand the close scrutiny of the complex EEOC guidelines. 360 F.Supp. at 992. There was no finding that the length of the program, the age requirement, the high school requirement, the physical test or the interview were violative of Title VII. 360 F.Supp. at 993-994. There was no evidence that JAC graded or administered tests or any other aspect of selection into the program or operated the program itself in a discriminatory fashion.

Recognizing the principles of law cited above, and applying them to these facts, the Court below exercised its judgment and awarded the National Employment Law Project attorneys' fees of $50,000.

Although this is less than the sum requested, Judge Bonsal, in fixing the amount, specifically stated (400 F. Supp. at 997):

> "Under the circumstances here presented and considering the funds received by the Project from other sources, the Project will be awarded $50,000 in attorneys' fees for its services in the Rios action."

The reference to the "funds received by the Project from other sources" clearly refers to the fact that the Project is almost entirely funded by the United States Office of Economic Opportunity ("OEO") and the EEOC. In addition to our contention that this funding precludes an award of attorneys' fees (infra), we believe that at a minimum the very fact of such Government funding was properly considered by the lower Court as a factor in setting the amount of the award.

Moreover, Judge Bonsal, recognizing that the JAC was a non-profit organization (400 F.Supp. at 997), which was responsible for the operation of a large part of the Affirmative Action Program, no doubt considered these financial burdens so important that the JAC should not be crippled by imposition of any liability for attorneys' fees. As we have previously discussed in the context of awarding back pay (pp. 19-22, JAC Back Pay Br.), the "frustration of purpose" concept, explicitly recognized by the Supreme Court in Albemarle (supra at 421), is an important consideration and has been applied in cases, similar to the instant action, where costs have been apportioned (United States v. Wood, Wire and Metal

Lath. Int. U., Loc. U. 46, 328 F.Supp. 429, 442 (S.D.N.Y. 1973)), and attorneys' fees denied (Chastang v. Flynn and Emrich Company, 381 F.Supp. 1348, 1351 (D. Md. 1974)).

A further consideration in determining the amount of the award is that the Project's attorneys duplicated in large part the work of the Government attorneys in this case. The relief granted in this action almost certainly would have been the same if the Rios suit had never been commenced. Cf. EEOC v. Local 28, Sheet Metal Workers, et al., ___F.2d___, Slip Op. 2481 (2d Cir. March 8, 1976).

In discussing appellate review of Title VII cases, the Supreme Court in Albemarle Paper Co. v. Moody, supra, reaffirmed the long standing rule that courts of appeal must recognize ". . . that the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases." 422 U.S. at 421-422. Since 1971 Judge Bonsal has been involved with this case, particularly with the JAC and the Affirmative Action Program which he approved. He has had several years to observe the parties and monitor their performance since his original decree and prior to his back pay and attorneys' fees awards. Under such circumstances, his awards should be accorded great weight and disturbed only if they constitute a clear abuse of discretion. We submit that Rios has failed to show such abuse of discretion.

POINT II

THE NATIONAL EMPLOYMENT LAW PROJECT, A LEGAL SERVICE ORGANIZATION FUNDED ALMOST ENTIRELY BY THE FEDERAL GOVERNMENT, IS NOT ENTITLED TO A STATUTORY AWARD OF ATTORNEYS' FEES

In their brief, the Rios plaintiffs request this Court to overrule the district court's determination that JAC is not liable for attorneys' fees. While JAC submits that the Court below properly exercised its discretion in refusing to award fees against JAC (Point I, supra.), we also submit that any award of attorneys' fees to the Rios attorneys is precluded by the very statute under which such fees are sought.

Section 706(k) of the Civil Rights Act of 1964, as amended, provides, in part, that:

> "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, ..." 42 U.S.C. § 2000e-5(k)(emphasis added).

The National Employment Law Project, attorneys for the Rios plaintiffs, has admitted that between 92% and 97% of the Project's funding comes from the United States Office of Economic Opportunity and the United States Equal Employment Opportunity Commission. Letter, Appendix at 760*; October 26, 1973 Affidavit of E. Richard Larson, page 2 (hereinafter

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*hereinafter, references to the Appendix will be in the form of "A-___."

referred to as "Larson Affidavit"), A-949, 950.

The Act itself states that the United States and the EEOC are not entitled to fees. 42 U.S.C. § 2000e-5(k). Surely the United States through OEO and EEOC cannot circumvent the statute by funding devices and contracts to the Project. 2A C.J.S. Agency, §§ 143-144 (1972). If the EEOC is allowed to circumvent the Act in this case, it will indirectly be able to circumvent a clear Congressional purpose, that litigation brought by the Government to enforce a law, should be borne by the public, and not by private individuals. Indeed, taken to its logical extreme, an endorsement by this Court of this situation would enable the United States Attorney's Office to "contract out" all of its cases to law firms and the Project, permitting attorneys employed by the law firms or the Project to collect attorneys' fees.

The Court below specifically recognized the fact that the Project is funded almost entirely through grants and contracts with the EEOC and OEO. 400 F.Supp. at 993, 997. See also Letter, A-760; Larson Affidavit, A-949, 950. However, the District Court then determined that the award of fees is precluded only when the prevailing party is the EEOC and/or the United States, and attempted to distinguish the Project from the EEOC or the United States. 400 F.Supp. at 996.

We respectfully submit that the factors enumerated by the District Court with regard to this distinction ar

inapplicable given the statutory intent, and therefore irrelevant. Thus, while the Project attorneys are not "government employees, [and] do not enjoy the protections of the civil service laws or of legislatively mandated salaries" (400 F.Supp. at 996), they are salaried, and almost all of those salaries come from the U.S. Treasury. There is no need to compensate them because they have in fact already been paid, and they have undertaken no personal financial risk in this case. Above all, the reasons for denying the Government any attorneys' fees apply equally to the Project which is but an extension of the Government, particularly since all of its expenses and personnel are paid almost entirely by the Government. If the Government cannot recover, neither should the Project.

The central question raised then, is whether the National Employment Law Project, which receives its support from the United States and EEOC, is precluded from receiving an award of attorneys' fees under 42 U.S.C. § 2000e-5(k). Although the Rios attorneys have cited several cases to this Court in which attorneys' fees were awarded to legal service organizations on a non-statutory basis (see e.g., Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281 (6th Cir. 1974);

Palmer v. Columbia Gas of Ohio, Inc., 375 F.Supp. 634 (N.D. Ohio 1974); Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974)) and cases where fees were awarded to legal service organizations under non-Title VII statutory provision (see e.g., Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974); Hairston v. R&R Apartments, 510 F.2d 1090 (7th Cir. 1975); Jones v. Seldon's Furniture Warehouse, Inc., 357 F.Supp. 886 (E.D. Va. 1973); Sellers v. Wollman, 510 F.2d 119 (5th Cir. 1975)), the Rios attorneys have failed to cite any case in which the specific issues raised by this appeal was decided. See e.g., Davis v. County of Los Angeles, ___ F.Supp. ___, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974), cited by Rios at 33, in which a Title VII fee award was granted to a privately funded public interest law firm; Doe v. Osteopathic Hospital of Wichita, Inc., 333 F.Supp. 1357 (D. Kan. 1971) in which an award was made to the Legal Aid Society without discussion of the statutory issue; Clark v. American Marine Corp., 437 F.2d 959 (5th Cir. 1971), in which fees were awarded to the privately-funded NAACP Legal Defense Fund, Inc.

Given the statutory prohibition of awards of attorneys' fees to the EEOC or the United States under 42 U.S.C. § 2000e-5(k) and given that none of the policy considerations in favor of awarding such fees are present

here, this Court should rule that the award of such fees to an organization funded almost entirely by the Federal Government be overturned.

CONCLUSION

We respectfully submit that the District Court's denial of an award of attorneys' fees as against JAC was proper and should be upheld by this Court.

Respectfully submitted,

BREED, ABBOTT & MORGAN and
DELSON & GORDON
Attorneys for Defendant-Appellee
Joint Steamfitters Apprenticeship
Committee of the Steamfitters
Industry

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Plaintiffs-Appellants,

-against-

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U.A., et al.,

Defendants-Appellees

etc.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

DONALD L. PRICE being duly sworn, says: I am employed in the office of Breed, Abbott & Morgan, 1 Chase Manhattan Plaza, New York, New York 10005, attorneys for Defendant-Appellee Joint Steamfitters Apprenticeship Committee in the above action.

On April 16, 1976, I served the annexed

Reply BRIEF FOR DEFENDANT-APPELLEE

by depositing 2 true copies thereof in a sealed, postpaid envelope at the post office box maintained at 1 Chase Manhattan Plaza, New York, N. Y. 10005, addressed to the following:

Steven J. Glassman, Esq., United States Attorney's Office, Southern District of New York, Foley Square, New York, New York 10007,
Richard Brook, Esq., Delson & Gordon, 230 Park Avenue, New York, New York 10017

Sworn to before me this
16th day of April 1976

Donald L. Price

Ave Maria Brennan

AVE MARIA BRENNAN
NOTARY PUBLIC, State of New York
No. 24-4527182
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1978

UNITED STATES COURT OF APPEALS
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etc.

- -x

AFFIDAVIT OF SERVICE ON PERSON IN CHARGE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Chester Kowalski being duly sworn, says: I am employed in the office of Breed, Abbott & Morgan, 1 Chase Manhattan Plaza, New York, N.Y. 10005, attorneys for the **Defendant Appellee Joint Steamfitters Apprenticeship Committee** in the above action.

On the **16th** day of **April**, 19**76**, between the hours of **9:30** A.M. and **5:30** P.M., I served the annexed

BRIEFS OF DEFENDANT-APPELLEE

on the attorney(s) listed below by delivering the same to and leaving the same with the person in charge of said office(s).

Marilyn R. Walter, Tufo, Johnston & Allegaert, 645 Madison Avenue New York, New Work 10022

Sworn to before me this
16 day of April 19)6

Chester Kowalski

Qualified in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1978